

NANCY MOREHEAD, )  
 )  
 Plaintiff, ) No. CV-07-3032-CI  
 )  
 v. ) ORDER DENYING PLAINTIFF'S  
 ) MOTION FOR SUMMARY JUDGMENT  
 ) AND DIRECTING ENTRY OF  
 MICHAEL J. ASTRUE, Commissioner ) JUDGMENT FOR DEFENDANT  
 of Social Security, )  
 )  
 Defendant. )  
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BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 17, 21.) Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Leisa Wolf represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and **GRANTS** Defendant's Motion of Summary Judgment.

On July 9, 2001, plaintiff Nancy Morehead (Plaintiff) protectively filed applications for disability insurance benefits and Social Security Income benefits. (Tr. 86-89, 219-23.) Plaintiff alleged disability due to mental impairments (bipolar, obsessive compulsive), hepatitis C, anger problems and abdominal

1 pain, with an onset date of December 1, 2000. (Tr. 92.) Benefits  
2 were denied initially and on reconsideration. (Tr. 40, 45-47.)  
3 Plaintiff requested a hearing before an administrative law judge  
4 (ALJ), which was held on November 5, 2004. (Tr. 332-54.) The ALJ  
5 found Plaintiff disabled on December 22, 2004. (Tr. 229-37.) The  
6 Appeals Council vacated the hearing decision on its own motion, and  
7 remanded the case for further development of the record, evaluation  
8 of the effects of Plaintiff's substance abuse on her alleged  
9 disability, and if necessary, vocational expert testimony.<sup>1</sup> (Tr.  
10 253-55.) Pursuant to the Appeals Council remand, a hearing was held  
11 on April 19, 2006, before ALJ Paul Gaughen. Plaintiff, who was  
12 represented by counsel, testified. Medical expert Ronald Klein,  
13 M.D., and vocational expert Diane Kramer also testified. (Tr. 355-  
14 402.) The ALJ denied benefits on November 21, 2006, and the Appeals  
15 Council denied review. (Tr. 6-8, 13-32.) The instant matter is  
16 before this court pursuant to 42 U.S.C. § 405(g).

#### 17 STATEMENT OF THE CASE

18 The facts of the case are set forth in detail in the transcript  
19 of proceedings, and are briefly summarized here. At the time of the  
20 hearing, Plaintiff was 52 years old (Tr. 383), and single with three  
21 adult children. (Tr. 201.) She stated she lived with her daughter  
22 and granddaughter for everyday support. (Tr. 384.) Plaintiff  
23 reported she finished high school and had two years of college.  
24 (Tr. 98.) Plaintiff has past work experience as a food server,  
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26 <sup>1</sup> Pursuant to 20 C.F.R. §§ 404.977, 416.1477, the hearing  
27 decision vacated by the Appeals Council has no binding effect on the  
28 ALJ decision before this court.

1 laborer, greenhouse worker, and fast food worker. (Tr. 101.)  
2 Plaintiff testified she stayed in her room most of the time, but  
3 travels six times a week for therapy and random urinalysis testing  
4 (UA's). She stated she attends AA meetings and was enrolled in  
5 methadone treatment at the time of the hearing. (Tr. 384-87.)

#### 6 ADMINISTRATIVE DECISION

7 At step one, ALJ Gaughen found Plaintiff had not engaged in  
8 substantial gainful activity during the relevant time. (Tr. 19.)  
9 At step two, he found Plaintiff had the severe impairments of a drug  
10 and alcohol abuse (DAA) induced mood disorder and alcoholism. He  
11 further found at step two that "absent DA/A [Plaintiff] does not  
12 have a severe impairment." (*Id.*) At step three, he determined  
13 Plaintiff's substance abuse induced mood disorder met the  
14 requirements of Section 12.09 of 20 C.F.R., Appendix 1, Subpart P,  
15 Regulations No. 4 (Listings). (Tr. 23.) He found that if Plaintiff  
16 stopped the substance abuse, however, "the remaining limitations  
17 would not cause more than a minimal impact on [her] ability to  
18 perform basic work activities," and she would not have a severe  
19 impairment or combination of impairments. (*Id.*) He determined  
20 Plaintiff's statements regarding her limitations were not totally  
21 credible, and found she did not have severe physical impairments.  
22 (Tr. 24.) He concluded DAA was a contributing factor material to  
23 Plaintiff's disability determination and, therefore, she was not  
24 "disabled" as defined by the Social Security Act. (Tr. 25.)

#### 25 STANDARD OF REVIEW

26 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
27 court set out the standard of review:

1 A district court's order upholding the Commissioner's  
2 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
3 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
4 Commissioner may be reversed only if it is not supported  
5 by substantial evidence or if it is based on legal error.  
6 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
7 Substantial evidence is defined as being more than a mere  
8 scintilla, but less than a preponderance. *Id.* at 1098.  
9 Put another way, substantial evidence is such relevant  
10 evidence as a reasonable mind might accept as adequate to  
11 support a conclusion. *Richardson v. Perales*, 402 U.S.  
12 389, 401 (1971). If the evidence is susceptible to more  
13 than one rational interpretation, the court may not  
14 substitute its judgment for that of the Commissioner.  
15 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169  
16 F.3d 595, 599 (9th Cir. 1999).

17 The ALJ is responsible for determining credibility,  
18 resolving conflicts in medical testimony, and resolving  
19 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
20 Cir. 1995). The ALJ's determinations of law are reviewed  
21 *de novo*, although deference is owed to a reasonable  
22 construction of the applicable statutes. *McNatt v. Apfel*,  
23 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 24 SEQUENTIAL PROCESS

25 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
26 requirements necessary to establish disability:

27 Under the Social Security Act, individuals who are  
28 "under a disability" are eligible to receive benefits. 42  
U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
medically determinable physical or mental impairment"  
which prevents one from engaging "in any substantial  
gainful activity" and is expected to result in death or  
last "for a continuous period of not less than 12 months."  
42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
from "anatomical, physiological, or psychological  
abnormalities which are demonstrable by medically  
acceptable clinical and laboratory diagnostic techniques."  
42 U.S.C. § 423(d)(3). The Act also provides that a  
claimant will be eligible for benefits only if his  
impairments "are of such severity that he is not only  
unable to do his previous work but cannot, considering his  
age, education and work experience, engage in any other  
kind of substantial gainful work which exists in the  
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
the definition of disability consists of both medical and  
vocational components.

In evaluating whether a claimant suffers from a

1 disability, an ALJ must apply a five-step sequential  
2 inquiry addressing both components of the definition,  
3 until a question is answered affirmatively or negatively  
4 in such a way that an ultimate determination can be made.  
5 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
6 claimant bears the burden of proving that [s]he is  
7 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
8 1999). This requires the presentation of "complete and  
9 detailed objective medical reports of h[is] condition from  
10 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
11 404.1512(a)-(b), 404.1513(d)).

12 It is the role of the trier of fact, not this court, to resolve  
13 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
14 supports more than one rational interpretation, the court may not  
15 substitute its judgment for that of the Commissioner. *Tackett*, 180  
16 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
17 Nevertheless, a decision supported by substantial evidence will  
18 still be set aside if the proper legal standards were not applied in  
19 weighing the evidence and making the decision. *Browner v. Secretary*  
20 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
21 there is substantial evidence to support the administrative  
22 findings, or if there is conflicting evidence that will support a  
23 finding of either disability or non-disability, the finding of the  
24 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
25 1230 (9<sup>th</sup> Cir. 1987).

#### 26 ISSUES

27 The question is whether the ALJ's decision is supported by  
28 substantial evidence and free of legal error. Plaintiff argues the  
ALJ erred in finding: (1) Plaintiff's drug and alcohol abuse was a  
contributing factor material to her disability; and (2) without the  
effects of substance abuse, she would have no severe impairments.  
She contends the ALJ improperly rejected the opinions of her medical

1 providers at step two when he evaluated her impairments without the  
2 effects of drug abuse. (Ct. Rec. 18 at 14.)

3 **DISCUSSION**

4 **A. Sequential Evaluation in the Context of Substance Addiction**

5 The Contract with America Advancement Act of 1996 (CAAA)  
6 amended the Social Security Act, providing that "an individual shall  
7 not be considered to be disabled . . . if alcoholism or drug  
8 addiction would . . . be a contributing factor material to the  
9 Commissioner's determination that the individual is disabled." 42  
10 U.S.C. § 423(d)(2)(C). Special statutes and regulations govern  
11 disability claims that involve substance abuse.

12 Under the Regulations implemented by the Commissioner, the ALJ  
13 must follow a specific analysis that incorporates the sequential  
14 evaluation discussed above. 20 C.F.R. §§ 404.1535(a), 416.935(a).  
15 The ALJ must conduct the five-step inquiry without attempting to  
16 determine the impact of substance addiction. If the ALJ finds that  
17 the claimant is not disabled under the five-step inquiry, the  
18 claimant is not entitled to benefits, and there is no need to  
19 proceed with further analysis. *Id.* If the ALJ finds the claimant  
20 disabled, and there is evidence of substance addiction, the ALJ  
21 should proceed under the sequential evaluation and §§ 404.1535 or  
22 416.935 to determine if the claimant would still be disabled absent  
23 the substance addiction. *Bustamante*, 262 F.3d 949, 955 (9<sup>th</sup> Cir.  
24 2001). If found disabled with the effects of substance addiction,  
25 it is the claimant's burden to prove substance addiction is not a  
26 contributing factor material to her disability. *Parra v. Astrue*,  
27 481 F.3d 742, 748 (9<sup>th</sup> Cir. 2007). As stated by the *Parra* court, a  
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1 drug-addicted claimant "who presents inconclusive evidence of  
2 materiality has no incentive to stop [abusing drugs], because  
3 abstinence may resolve his disabling limitations and cause his claim  
4 to be rejected or his benefits terminated." *Id.* Thus, through the  
5 CAAA, Congress seeks "to discourage alcohol and drug abuse, or at  
6 least not to encourage it with a permanent government subsidy."  
7 *Ball v. Massanari*, 254 F.3d at 817, 824 (9<sup>th</sup> Cir. 2001).

8 Here, ALJ Gaughen properly considered Plaintiff's impairments  
9 with and without the effects of her long history of drug addiction  
10 and alcoholism. In his first sequential evaluation, he found at  
11 step 2 and 3 that Plaintiff's substance induced mood disorder and  
12 alcoholism were severe and met the Listing requirements under  
13 section 12.09. (Tr. 19.) This finding is supported by substantial  
14 evidence.

15 The record shows Plaintiff has struggled with heroin addiction  
16 for 30 years. (Tr. 140, 182.) The medical records submitted by  
17 Plaintiff consist primarily of treatment notes and psychological  
18 evaluations conducted in conjunction with her mental health/ DAA  
19 treatment at Central Washington Comprehensive Mental Health (CWCMH)  
20 from 1998 through 2006. (Tr. 127-218, 278-89, 291-328.) Plaintiff  
21 does not challenge the ALJ's findings at step two that, with the  
22 effects of her drug addiction, she met the Listings under section  
23 12.09. (Tr. 23.) She asserts, however, that in the ALJ's second  
24 sequential evaluation, he failed to properly evaluate the medical  
25 evidence during an alleged period of abstinence in 2003 to 2004.  
26 (Ct. Rec. 18 at 10.) She contends the record supports a step two  
27 finding that she had severe mental impairments without the effects  
28 of substance addiction during that period. (Ct. Rec. 18 at 13.)

1 **B. Step Two Determinations**

2 To satisfy step two's requirement of a severe impairment, the  
3 Plaintiff must provide medical evidence consisting of signs,  
4 symptoms, and laboratory findings; the claimant's own statement of  
5 symptoms alone will not suffice. 20 C.F.R. § 416.908. The effects  
6 of all symptoms must be evaluated on the basis of a medically  
7 determinable impairment which can be shown to be the cause of the  
8 symptoms. 20. C.F.R. § 416.929. The Commissioner has passed  
9 regulations which guide dismissal of claims at step two. Those  
10 regulations state an impairment may be found to be not severe only  
11 when evidence establishes a "slight abnormality" on an individual's  
12 ability to work. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir.  
13 1988) (*citing Social Security Ruling (SSR) 85-28*). The ALJ must  
14 consider the combined effect of all of the claimant's impairments on  
15 the ability to function, without regard to whether each alone was  
16 sufficiently severe. See 42 U.S.C. § 423(d)(2)(B) (Supp. III 1991).  
17 The step two inquiry is a *de minimis* screening device to dispose of  
18 groundless or frivolous claims. *Bowen v. Yuckert*, 482 U.S. 137,  
19 153-154.<sup>2</sup>

20 As discussed above, where drug or alcohol addiction is a  
21 consideration, the Commissioner must evaluate impairments with and  
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23 <sup>2</sup> A mental impairment generally is considered non-severe for  
24 purposes of step two if the degree of limitation in the three  
25 functional areas of activities of daily living, social functioning,  
26 and concentration, persistence or pace is rated as "none" or "mild"  
27 and there have been no episodes of decompensation. 20 C.F.R. §§  
28 404.1520a(d)(1), 416.920a(d)(1).



1 without the effects of substance addiction in the step two analysis.  
2 *Bustamante*, 262 F.3d at 955. However, the Ninth Circuit has held  
3 explicitly that where disability is established with the effects of  
4 DAA, the "claimant bears the burden of proving that drug or alcohol  
5 addiction is not a contributing factor to [her] disability." *Parra*,  
6 481 F.3d at 748.

7 Here, the ALJ considered the opinions in a Psychiatric  
8 Evaluation by Sandy Birdlebough, Ph.D., ARNP, dated November 19,  
9 2003. (Tr. 200-02.) Also reviewed and summarized in the decision  
10 were treatment notes and evaluation forms completed by mental health  
11 counselor Christopher Clark, M.Ed LMHC, dated September 2003 and  
12 September 2004 (Tr. 176-185), records and intake assessment by CWCMMH  
13 counselor Tricia Jennings dated August 18, 2005 (Tr. 278-81), and  
14 mental residual functional capacity assessment summary conclusions,  
15 completed by Kris Davis, MA, dated November 8, 2005.<sup>3</sup> (Tr. 278-83,  
16 288-89.)

17 The ALJ found all assessments by the mental health providers  
18 reflected Plaintiff's limitations with the effects of drug addiction  
19 and/or alcoholism. (Tr. 25.) He concluded if Plaintiff stopped the  
20 substance abuse, "the remaining limitations would not cause more  
21 than a minimal impact on [her] ability to perform basic work  
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23 <sup>3</sup> The record indicates Mr. Clark was Plaintiff's intake  
24 specialist at CWCMMH in 2003 and 2004. Ms. Jennings was Plaintiff's  
25 counselor at CWCMMH August 30, 2005, to May 26, 2006. Plaintiff  
26 testified in April 2006 that Ms. Davis was her mental health  
27 therapist. However, the record does not include treatment notes  
28 signed by Ms. Davis. (Tr. 192, 207, 386.)

1 activities." (Tr. 23.) Plaintiff asserts she was clean and sober  
2 from 2003 to 2004,<sup>4</sup> and argues the ALJ improperly rejected the  
3 opinions of her providers that (1) she had severe mental impairments  
4 during that period of alleged abstinence, and (2) her psychological  
5 limitations were not due to DAA. (Ct. Rec. 18 at 14.)

6 1. Acceptable Medical Sources

7 In a disability proceeding, the ALJ must consider the opinions  
8 of acceptable medical sources, such as Dr. Birdlebough and medical  
9 expert Dr. Klein. 20 C.F.R. §§ 404.1527 (d), 416.927 (d). Unless  
10 properly rejected, a treating or examining psychologist's opinion is  
11 given more weight than that of a non-examining psychologist.  
12 *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004). If the  
13 treating doctor's opinions are not contradicted, they can be  
14 rejected only with "clear and convincing" reasons. *Lester v.*  
15 *Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). If contradicted, the ALJ  
16 may reject an opinion if he states specific, legitimate reasons that  
17 are supported by substantial evidence. See *Flaten v. Secretary of*  
18 *Health and Human Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995).  
19 Historically, the courts have recognized conflicting medical  
20 evidence, the absence of regular medical treatment during the  
21 alleged period of disability, and the lack of medical support for a  
22 doctor's report based substantially on a claimant's subjective  
23 complaints as specific, legitimate reasons for disregarding the  
24 treating physician's opinion. *Flaten*, 44 F.3d at 1463-64; *Fair v.*

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26 <sup>4</sup> Plaintiff apparently concedes DAA was a contributing factor  
27 material to her mental impairments during the years. (See Ct. Rec.  
28 18 at 12, 13-14.)

1 Bowen, 885 F.2d 597, 604 (9<sup>th</sup> Cir. 1989). The ALJ is not required to  
2 accept the opinion of a treating or examining physician if that  
3 opinion is brief, conclusory and inadequately supported by clinical  
4 findings. *Thomas v. Barnhart*, 278 F.3d 947, 957 (9<sup>th</sup> Cir. 2002).

5 In addition to medical reports in the record, the analysis and  
6 opinion of a non-examining medical expert selected by the ALJ may be  
7 helpful in his adjudication. *Andrews*, 53 F.3d at 1041 (citing  
8 *Magallanes v. Bowen*, 881 F.2d 747, 753 (9<sup>th</sup> Cir. 1989)). Testimony of  
9 a medical expert may serve as substantial evidence when supported by  
10 other evidence in the record. *Id.*

11 It appears Dr. Birdlebough was a supervising psychologist at  
12 CWCMH, as well as an ARNP involved in medication management. (Tr.  
13 197.) In November 2003, she conducted an interview and Mental  
14 Status Examination, during which Plaintiff reported her last illegal  
15 drug use was July 2002. (Tr. 200.) In a CWCMH progress note, also  
16 dated November 19, 2003, and co-signed by Dr. Birdlebough, the  
17 counselor noted Plaintiff was there for her initial appointment.  
18 Plaintiff reported she was paroled in April 2003 and was attending  
19 chemical dependency treatment elsewhere. (Tr. 197.) Dr.  
20 Birdlebough reported Plaintiff had "marked symptoms of obsessive-  
21 compulsive behavior that includes cleaning excessively and  
22 repetitive counting . . . [and] marked symptoms of anxiety, social  
23 isolation, and avoidance." (Tr. 202.) She concluded Plaintiff fit  
24 criteria for major depressive disorder which was "more of a  
25 dysthymic disorder" rather than a major depression episode. *Id.*  
26 Based on the interview, Dr. Birdlebough diagnosed obsessive  
27 compulsive disorder, dysthymia, opiate dependence in reported  
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1 remission, anxiety disorder, NOS, personality disorder, NOS, with  
2 dependent, avoidant, narcissistic, histrionic and antisocial traits,  
3 with marked symptoms. She opined Plaintiff had "over a year clean  
4 and sober," based on Plaintiff's self report. (Tr. 200, 202.)  
5 Plaintiff was prescribed Paxil and trazodone. (Tr. 202.)

6 In his analysis, the ALJ gave limited weight to Dr.  
7 Birdlebough's evaluation and relied on the testimony of medical  
8 expert, Ronald Klein, M.D. (Tr. 25.) Dr. Klein testified at length  
9 on the effects of a 30-year heroin addiction on an individual's  
10 mental health. He explained that using two grams of heroin per day  
11 and cocaine one to two times per week would significantly affect her  
12 mental health, and the effects would not resolve in the short  
13 periods of abstinence discussed in the record. (Tr. 369, 373, 376.)  
14 Contrary to Plaintiff's alleged sobriety in 2003 and 2004, Dr.  
15 Klein's review of the entire record at the hearing revealed that  
16 Plaintiff reported two relapses with alcohol in 2004. (Tr. 210,  
17 366.) In addition to reported relapses, the record indicates she  
18 sought drug addiction treatment after being released from jail in  
19 2005, and during that treatment, admitted her last use of cocaine  
20 was in 2003 and marijuana in 2004. (Tr. 279.)

21 Dr. Klein testified Plaintiff's treatment record evidenced an  
22 "established behavior pattern" for long term use, indicating the  
23 same level of use in 2000 as in 2005. (Tr. 365, 369, 371.) This  
24 testimony is supported by the record, which also documents multiple  
25 unsuccessful treatment attempts, with discharges due to alcohol  
26 relapse. (Tr. 152-53, 174, 279, 282.) In November 2005, counselor  
27 Jennings expressed concern that Plaintiff was not abstinent, based  
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1 on Plaintiff's self-reported alcohol consumption and admission that  
2 she drank when her daughter was not home. (Tr. 308-09.) In  
3 December 2005, she had a positive alcohol test, and in 2006, she  
4 admitted using heroin while in jail. (Tr. 315, 320.) In March  
5 2006, Plaintiff resumed treatment after release from jail. At that  
6 time, Ms. Jennings noted "there is no way to tell how much she has  
7 been using since she was gone." (Tr. 320.)

8 Significantly, Dr. Klein testified that substance abuse induced  
9 mental disorders "do not end when someone goes into remission" and  
10 the length of remission is relative to the materiality of drug  
11 addiction on her mental impairments. (Tr. 373, 376.) He also  
12 explained on cross examination that Plaintiff's anxiety and  
13 depression were related to her use of drugs, as well as the  
14 intermittent withdrawal from drugs after every use episode. (Tr.  
15 378.) The ALJ interpreted the evidence, including reports by the  
16 treatment providers, as consistent with Dr. Klein's testimony that  
17 Plaintiff's impairments were not severe without the effects of DAA.  
18 (Tr. 23, 372.)

19 After summarizing Dr. Birdlebough's findings, the ALJ gave  
20 specific reasons for giving little weight to her opinions, finding  
21 (1) they were not based on objective testing, (2) they were based on  
22 Plaintiff's unreliable self report,<sup>5</sup> and (3) they were not  
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24 <sup>5</sup> A claimant's credibility is an appropriate factor considered  
25 in the evaluation of medical evidence. *Webb v. Barnhart*, 433 F.3d  
26 683, 688 (9<sup>th</sup> Cir. 2005). The ALJ, who is responsible for  
27 determining credibility, found Plaintiff's testimony regarding the  
28 severity of her limitations was not entirely credible. *Andrews*, 53

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3 F.3d at 1039. His determination is supported by "clear and  
4 convincing reasons." *Thomas*, 278 F.3d at 958-959. Specifically, he  
5 found the record indicates she is able to care for her personal  
6 needs; she attends meetings with people she has known for 20 years  
7 and attends therapy monthly (contrary to testimony that she rarely  
8 comes out of her room and has panic attacks around other people);  
9 she has refused to complete urinalysis tests; she was assessed as  
10 having no perceptual disturbances (contrary to her testimony of  
11 having agoraphobia); and she misrepresented her use of marijuana and  
12 methamphetamine to her counselors. (Tr. 24.) The court may also  
13 make "legitimate inferences" from the ALJ's opinion. *See, e.g.,*  
14 *Magallanes*, 881 F.2d at 755. In his summary of Plaintiff's August  
15 2005 mental status exam, the ALJ noted Plaintiff denied  
16 hallucinations or delusion; her thought content was observed as  
17 appropriate, her judgment was good, speech and body movements were  
18 normal. (Tr. 21.) Inconsistencies in the record noted in the ALJ's  
19 opinion include: In August 2005, she reported to Ms. Jennings she  
20 was abstinent from illegal drugs from 1991 to 1995, but used cocaine  
21 in 2003, and marijuana in 2004; in November 2003, she reported to  
22 Dr. Birdlebough her last use was July 2002. (Tr. 183, 200, 279.)  
23 She also reported to Ms. Jennings that her longest period of  
24 abstinence was her last methadone treatment, which Mr. Clark noted  
25 in his September 2003 evaluation as having been from June 12, 2001,  
26 through November 2001 at CWCMMH. (Tr. 182.) Plaintiff failed to  
27 follow up with treatment in December 2003, admitted abusing her  
28 prescription medication and was incarcerated several times during

1 consistent with the testimony of Dr. Klein, who had an opportunity  
2 to view Plaintiff's longitudinal substance abuse history. (Tr. 20,  
3 25, 200-01, 210.) These are specific, legitimate reasons to reject  
4 a treating psychologist's opinion. *Flaten*, 44 F.3d at 1463-64. As  
5 discussed above, symptoms alone are insufficient to establish a  
6 severe impairment, and the ALJ properly rejected Dr. Birdlebough's  
7 diagnoses due to a lack of objective testing results. 20 C.F.R. §§  
8 404.1529, 416.929; *Ukolov v. Barnhart*, 420 F.3d 1002, 1005 (9<sup>th</sup> Cir.  
9 2005) (alleged symptoms do not establish severe impairment at step  
10 two without objective testing results to confirm impairment); *SSR*  
11 96-4p (objective medical abnormalities required to establish mental  
12 impairment).

13 The ALJ reasonably relied on Dr. Klein's testimony which is  
14 supported by substantial evidence. The record shows inconsistencies  
15 in reporting by Plaintiff, evidence of ongoing drug use, no  
16 significant limitations on activities of daily living, no  
17 significant effect on actual work activities, and noncompliance with  
18 substance addiction treatment program. (Tr. 308, 309, 314, 324.)  
19 See *supra* n.5. Plaintiff's reports of abstinence are inconsistent  
20 and undocumented. Substantial evidence supports the ALJ's  
21 interpretation of the evidence, and his rejection of Dr.  
22 Birdlebough's evaluation based on Plaintiff's self report. *Webb*,  
23 433 F.3d at 688; *Batson v. Commissioner of Social Sec. Admin.*, 359  
24 F.3d 1190, 1193 (9<sup>th</sup> Cir. 2004).

25 \_\_\_\_\_  
26 the period at issue. (Tr. 19-21 .) The ALJ did not err in  
27 discounting the severity of Plaintiff's alleged symptoms and  
28 allegations of abstinence.

2. Mental Health Therapists

The opinions of Mr. Clark and Ms. Davis are considered "other source" opinions under the Regulations. "Other sources" include nurse practitioners, physicians' assistants, therapists, teachers, social workers, spouses and other non-medical sources. 20 C.F. R. §§ 404.1513(d), 416.913(d). Non-medical testimony can never establish a diagnosis or disability absent corroborating competent medical evidence. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9<sup>th</sup> Cir. 1996). The opinion of an acceptable medical source is given more weight than that of an "other source." 20 C.F.R. §§ 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d 967, 970-71. (9<sup>th</sup> Cir. 1996). However, the ALJ is required to "consider observations by non-medical sources as to how an impairment affects a claimant's ability to work." *Sprague*, 812 F.2d at 1232.

Pursuant to *Dodrill v. Shalala*, 12 F.3d 915, 919 (9<sup>th</sup> Cir. 1993), an ALJ is obligated to give reasons germane to "other source" testimony before discounting it. Here, the ALJ summarized the therapists form evaluations and gave legally sufficient reasons for rejecting the limitations assessed by her counselors. He also rejected their representations that Plaintiff was "clean and sober" during the time they assessed her. (Tr. 25.) Specifically, he found the assessments were based on unreliable self-report, did not reflect limitations without DAA, and were not consistent with the testimony of Dr. Klein, an acceptable medical source. (Tr. 25.) These are legally sufficient to reject "other source" opinions.

Contrary to Plaintiff's report to Mr. Clark that she was drug free between 2003 and 2004, the record shows she had ongoing



1 problems with treatment compliance and abstinence. She was  
2 relapsing during this time, as indicated by her self-reported  
3 cocaine and marijuana use (Tr. 210), and alcohol use in April and  
4 December 2004. (Tr. 279). Further, there is no evidence that  
5 symptoms observed by her counselors interfered with actual work  
6 activities or activities of daily living.<sup>6</sup> The ALJ's rejection of  
7 the counselors' form reports was not legal error. Because there is  
8 no credible evidence of abstinence, Plaintiff has not met her burden  
9 of proving DAA was not material to her mental disorder disability.  
10 *Parra*, 481 F.3d at 748.

#### 11 CONCLUSION

12 Plaintiff has the burden of proving her 30-year history of  
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14 <sup>6</sup> Plaintiff's argument that the ALJ had a duty to inquire as  
15 the basis of Mr. Clark's opinions is unpersuasive. "Other source  
16 opinions" that conflict with those of an acceptable medical source  
17 do not give rise to this duty. Further, an ALJ's duty to develop  
18 the record further is triggered "only when there is ambiguous  
19 evidence or when the record is inadequate to allow for proper  
20 evaluation of evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-60  
21 (9<sup>th</sup> Cir 2001) (citing *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9<sup>th</sup>  
22 Cir. 2001)). The ALJ reasonably relied on Dr. Klein's unambiguous  
23 testimony that was supported by the record. Plaintiff's reliance on  
24 *Smolen* is misplaced, as the opinions at issue in that case were  
25 those of an acceptable medical source whose opinions were  
26 uncontroverted and corroborated. *Smolen v. Chater*, 80 F.3d 1273,  
27 1288 (9<sup>th</sup> Cir. 1996).

1 heroin addiction and alcoholism is not a contributing factor  
2 material to her mental disorder disability. Plaintiff did not meet  
3 her burden of proof, and the ALJ's interpretation of Plaintiff's  
4 medical records and expert testimony is reasonable. The ALJ's  
5 findings that substance addiction is a contributing factor material  
6 to Plaintiff's disability, and without substance addiction she has  
7 no severe impairments are without legal error and supported by  
8 substantial evidence. Accordingly,

9 **IT IS ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is  
11 **DENIED.**

12 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 21**) is  
13 **GRANTED.**

14 The District Court Executive is directed to file this Order and  
15 provide a copy to counsel for Plaintiff and Defendant. Judgment  
16 shall be entered for Defendant and the file shall be **CLOSED.**

17 DATED August 19, 2008.

18  
19 S/ CYNTHIA IMBROGNO  
20 UNITED STATES MAGISTRATE JUDGE  
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